Supreme Court, U.S.
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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

HARVEY BONHAM FOX,
Petitioner,
v.
DAVID R. HINSON, Administrator,
Federal Aviation Administration,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTION PRESENTED

Whether the National Transportation Safety Board and the Circuit Court improperly found a violation of 14 C.F.R. § 91.9 [now 91.13(a)], which provides that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another" in the absence of any evidence that Petitioner acted in a careless or reckless manner or any assertion that actual damage to life or property occurred.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

On May 30, 1991, Administrative Law Judge Joyce Capps found Petitioner in violation of 14 C.F.R. § 91.65(d) and 14 C.F.R. § 91.9 (now § 91.13(a)). The Oral Initial Decision and Order is attached as Appendix A. That Order was affirmed by the National Transportation Safety Board in its Opinion and Order of March 31, 1994, attached as Appendix B. The Order of the United States

Court of Appeals for the District of Columbia Circuit affirming the National Transportation Safety Board Opinion and Order was handed down on December 26, 1995. That Order is attached as Appendix C.

JURISDICTIONAL GROUNDS

Petitioner requests review of the judgment of the District of Columbia Circuit entered December 26, 1995, denying Petitioner's Petition for Review of the NTSB Order dated March 31, 1994. The Supreme Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Jurisdiction of the Administrative Law Judge was based on 14 C.F.R. § 821.30. Jurisdiction of the National Transportation Safety Board was based on 14 C.F.R. § 821.47. Jurisdiction of the District Court was based on Title 49 U.S.C. § 1486(a) and 14 C.F.R. § 821.64.

RELEVANT STATUTORY PROVISIONS

This Petition concerns the provisions of 14 C.F.R. § 91.9 (now § 91.13(a)), which is set out in Appendix D.

STATEMENT OF THE CASE

Events occurring on TWA Flight 559

On the evening of November 21, 1989, TWA flight 559, a DC-9-32, operated between St. Louis, Missouri, and Austin, Texas. Petitioner herein, Captain Harvey Bonham Fox, was assigned as pilot in command of the flight. The flight was scheduled to depart at 7:30 p.m., and Captain Fox had some concern about the weather that might be encountered along the route. Therefore, he assigned his First Officer, Phillip Moore, to actually fly the aircraft while Captain Fox handled the radios and manned the radar equipment on the aircraft.

After departing St. Louis, Flight 559 was cleared by Kansas City Center to climb to Flight Level 230.[1] When the clearance to Flight Level 230 was received, Captain Fox repeated the clearance to the controller. First Officer Moore also repeated the clearance and dialed in the altitude assignment on an "altitude alerter", located in the cockpit.

As Flight 559 was leaving the clouds Kansas City Center gave a frequency change to 132.65. Captain Fox took out his pen and wrote down "132.65" on a notepad. He reached up to turn off the light he had been using and began to move his hand down to tune the radio. At that point lightning from thunderstorms ahead of the aircraft began to light up the sky. Captain Fox adjusted the range scale on the radar in an attempt to get the thunderstorms on the radar screen. At that same time the First Officer called out for a change in the setting of the altimeters on the aircraft. After completing those two actions Captain Fox returned to the radio to enter the new frequency. Instead of dialing in "132.65", Captain Fox entered "132.60".[2] At that point he picked up the microphone and, transmitting on the new frequency of 132.60, said "TWA 559 out of 18.4 for 230".[3]

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[1]Flight Level 230 is based upon standard atmospheric pressure and corresponds to an altitude of approximately 23,000 feet. All aircraft flying above 18,000 feet use the same pressure reference and, therefore, maintain constant altitudes relative to each other.

[2]A frequency of "132.65" is 132.65 Megahertz and is in the Very High Frequency (VHF) range used for aircraft to ground communications. The aircraft radio is designed to enter frequencies by turning knobs, and frequencies are entered in increments of 0.05 Megahertz, i.e., 132.55, 132.60, 132.65, 132.70, etc.

[3]This report indicated that TWA 559 was climbing through an altitude of 18,400 feet on the way to its assigned altitude of Flight Level 230 (approximately 23,000 feet).

The next thing Captain Fox heard over the radio was "TWA 559 cleared to 290".[4] Captain Fox acknowledged the transmission by replying "TWA 559 up to 290". First Officer Moore also acknowledged this new altitude assignment by repeating what he had heard to Captain Fox, and by dialing the new altitude into the "altitude alerter". At that point one of the Flight Attendants called the flight deck and Captain Fox took the call. While he was taking the call he turned radio communication duties over to First Officer Moore. After resuming communications duties Captain Fox transmitted to Kansas City Center that Flight 559 was "out of 280 for 290" and Center acknowledged the transmission.[5]

At that point the controller called Flight 559 and said that the aircraft had not been assigned to Flight Level 290. Captain Fox repeated that the Flight had in fact been cleared to that altitude. The controller told Flight 559 to change to a frequency of "132.65", and Captain Fox did so. When he checked in, Captain Fox was told that Flight 290 was "fine, you're at 290, good, stay there, that's a good altitude for you". In fact, *that was the only altitude available at that time.* The rest of the flight was uneventful.

Events occurring at Kansas City Center

Mr. David Kleber was the FAA controller assigned to Sector 42 of the Kansas City Center on the night in question. In that position he was responsible for communications on six different frequencies, including 132.60, but excluding 132.65. The frequency of 132.65 was being worked by Sector 29, which was located across the room from Mr. Kleber.

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[4]Flight Level 290 is approximately 29,000 feet.

[5]This transmission indicated that the aircraft was leaving Flight Level 280 (approximately 28,000 feet) for the assigned altitude of Flight Level 290 (approximately 29,000 feet).

Mr. Kleber testified that he heard an unidentified aircraft on one of his frequencies report "out of 18, climbing to 23". When Captain Fox made that call Mr. Kleber was talking to another controller on the "hand off line" and, thus, had another voice in his ear distracting him at the time. Mr. Kleber testified that he was receiving a request from another Sector to reassign a Northwest Airlines Flight, NWA 226, to Flight Level 290. However, instead of issuing the clearance to Flight 226, Mr. Kleber mistakenly issued the clearance to Flight "229". He heard an unidentified aircraft acknowledge the clearance to "29" [Flight Level 290].[6] At that point Mr. Kleber knew he had a problem and attempted to contact what he felt was an unidentified aircraft on one of his frequencies. Finally, he heard TWA Flight 559 reporting "out of 28 [Flight Level 280] for 29 [Flight Level 290]" and he established contact. Mr. Kleber verified that *Flight Level 290 was an appropriate altitude for the aircraft* and had Flight 559 contact the appropriate controller.

NTSB Oral Initial Decision and Order

Judge Capps ruled that "[a]n improper frequency setting always gives rise to *potential danger* so, therefore, the 91.9 [violation] has also been established" (Appendix A, p. 4, ll. 9-11, emphasis added). She also refused to consider Petitioner Fox's proffered evidence that the mis-dialing of a frequency was such a commonplace occurrence that it could not be considered negligent.[7]

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[6] Judge Capps found, and the NTSB corrected, that Captain Fox had actually acknowledged the clearance as TWA 559, and that this acknowledgment should have been picked up by the controller (Appendix A, p. 4, ll. 18-21).

[7] At the hearing before the Administrative Law Judge Petitioner Fox offered a report of a study conducted by the FAA System Improvement Division in 1989 involving a survey of readback errors encountered

The Circuit Court's Memorandum accompanying its Judgment denying the Petition for Review simply affirmed the NTSB's position that even a non-negligent violation of an operational regulation was sufficient to support a finding of a "residual violation" of 91.9, even when there was no actual danger resulting from the incident (Appendix C).

REASONS FOR GRANTING THE WRIT

THIS PETITION PRESENTS AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION INVOLVING TENS OF THOUSANDS OF PILOTS AND INVOLVING CONDUCT THAT OCCURS DURING THOUSANDS OF FLIGHTS WITHIN THE UNITED STATES EVERY DAY.

Every pilot in the United States, from a low time student pilot to the most senior airline captain, has studied the Federal Aviation Regulations, has been tested on those Regulations, and is aware that they govern every aspect of every flight within the United States. Those pilots have read and applied a regulation that tells them they can be punished if they operate an aircraft in a careless or reckless manner, and if that operation endangers the life or property of another. That punishment can involve probably the most severe penalty that can be imposed on a person in love with aviation — the loss of his or her right to fly an aircraft. Pilots tend to be a careful group of individuals who are extremely concerned with safety because of the unforgiving consequences of any lapse of care or judgment. Nevertheless, the most careful pilot in the world who makes a non-negligent

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during a five day period throughout the United States. That study determined that 40% of the errors detected related in improper frequency selection. At the Kansas City Center (the one involved in the subject incident) the error rate was actually 47%. Judge Capps refused to admit the Report and refused to credit any testimony regarding the Report or its conclusions.

mistake during a flight — a mistake that does not endanger life or property, and that has absolutely no effect on the safety of the flight — can still be grounded by the FAA, applying the interpretation of 91.9 adopted by the NTSB in this case and affirmed by the Circuit Court. It is respectfully submitted that virtually every aviation pioneer, including Orville and Wilbur Wright, Charles Lindbergh, and Amelia Earhart would have found themselves grounded if the NTSB's interpretation of 91.9 was applied to their actions.[8]

This Court has recognized the importance of *certiorari* when important and recurring, questions involving the interpretation of federal law arise (*Swanner v. Anchorage Equal Rights* (1994) No. 94-169, ____ U.S. ____ (Thomas, J., dissenting), and when conflicts arise regarding the meaning of provisions of federal law (see generally *Braxton v. United States* (1991) 500 U.S. 344; *Langenkamp v. Culp* (1990) 498 U.S. 42). Petitioner respectfully urges that the interpretation of the regulation in question, which applies to every flight taking place every day within the United States, and which involves the most fundamental and basic standard of conduct governing those flights, presents such an important and recurring question as to merit this Court's consideration.

THE NTSB AND THE CIRCUIT COURT ERRONEOUSLY HELD THAT A NON-NEGLIGENT, NON-CARELESS ACT WHICH DID NOT RESULT IN ACTUAL ENDANGERMENT OF LIFE AND PROPERTY COULD NEVERTHELESS BE A VIOLATION OF 14 C.F.R. PART 91.9.

This petition is presented so that this Court may address an erroneous interpretation of the Federal Aviation Regulations on the part of the Federal Aviation Administration.

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[8]Of the historical and mythical characters associated with flight, Petitioner does concede that Icarus might have been subject to action by the FAA under 91.9.

That erroneous interpretation has been adopted by the National Transportation Safety Board and was recognized by the Circuit Court in this case.

Title 14 C.F.R. Part 91.9 provides:

> "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

That regulation clearly proscribes only two categories of action: careless or reckless operation of an aircraft. Moreover, the regulation plainly requires that the careless or reckless conduct result in actual endangerment to life or property. In complete disregard of the clear and unambiguous language of the regulation, Judge Capps held that the mere act of selecting the wrong frequency *always* gives rise to *potential* danger, and that such an act therefore violates § 91.9 (Appendix A, p. 4, ll. 9-11). This interpretation of a regulation in a manner completely contrary to the plain language of the regulation constitutes a violation of Petitioner's due process rights.

A penal statute is one which is expressly enforceable by fine, imprisonment, or similar punishment (*Taylor v. United States* (1845) 44 U.S. 197). A statute is likewise considered penal in nature if it includes penalties and forfeitures (*United States v. Constantine* (1935) 296 U.S. 287). Statutes authorizing revocation of a license, or which have the potential to bring about a revocation, are considered penal (*Chevrolet v. New Motor Vehicle Board* (1978) 146 Cal.App.3d 533). It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government seeking to enforce the penalty (*Federal Communications Commission v. American Broadcasting Co.* (1954) 347 U.S. 284, 296) and that one "is not to be subjected to a penalty unless the words of the statute plainly impose it" (*Keppel v. Tiffin Savings Bank* (1905) 197 U.S.

356, 362; *Commissioner v. Acker* (1959) 361 U.S. 87, 91; see *United States v. Moore* (D.C.Cir., 1979) 613 F.2d 1029, 1043). The Court has noted in an analogous context that "when [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite" (*United States v. Universal C.I.T. Credit Corp.* (1952) 344 U.S. 218, 221-222).

The particular regulation at issue, 91.9, prohibits "careless or reckless" operation of an aircraft "so as to endanger the life or property of another." That language is both clear and definite. By its very terms, the statute applies *only* to conduct that is either negligent, reckless, or intentional. The NTSB, however, held that *any* deviation from the standard of conduct established by a regulation is sufficient to support a "residual" or "derivative" violation of 91.9. (Appendix B, p. 7 & 8).[9] Such an interpretation totally ignores the legal requirement that 91.9 be strictly interpreted against the government. It is also a principle of statutory construction that effect must be given, if possible, to every word, clause and sentence of a statute (*Helton v. Fauver* (3d Cir., 1991) 930 F.2d 1040). A construction which results in absurd consequences must be avoided (*In re Brichard Securities Litigation* (N.D.Cal., 1992) 788 F.Supp. 1098).

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[9]Petitioner does not challenge the fact that even a non-negligent act may, under appropriate conditions, constitute a violation of a regulation. For example, Petitioner does not challenge before this Court the NTSB finding that Petitioner violated 14 C.F.R. Part 91.65(d) (prohibiting compliance with a clearance issued to another aircraft), even though that violation may have been unintentional and non-negligent. That regulation establishes a strict liability standard of conduct, unlike the regulation challenged herein, which establishes only a negligence standard of liability.

In light of the foregoing legal principles, it is clear that the NTSB erred, as a matter of law, in holding that even a non-negligent deviation from an operational regulation which results in no actual endangerment is sufficient to support of violation of 91.9. In fact, what the NTSB has done is take a regulation which clearly and unambiguously proscribes only "careless or reckless" conduct and converted it into a regulation which creates an irrebuttable presumption of negligence for *any* conduct, even non-negligent conduct. The term "reckless" has a well defined and understood legal meaning:

> "The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. *See* Prosser and Keeton § 34, pp. 213-214; Restatement (Second) of Torts § 500 (1965)." *Farmer v. Brennan* (1994) No. 927247, ____ U.S. ____.

The NTSB's interpretation gives the regulation an extremely liberal and broad s. ope, whereas rules of statutory construction mandate that the regulation be interpreted narrowly and strictly against the government. And by finding a "residual" or "derivative" violation of 91.9 for even non-negligent deviations from an operational regulation the NTSB has expanded the scope of liability far beyond the plain meaning of the "careless or reckless" language used in 91.9. Finally, NTSB's interpretation leads to absurd and unreasonable consequences. For example, if Captain Fox mis-dialed "132.60", began to transmit, immediately caught his mistake and changed to "132.65" the FAA and the NTSB would nevertheless find a violation of 91.9. If Captain Fox had begun to comply with the clearance issued to Northwest 229, but immediately caught his error and never deviated from his altitude assignment, the NTSB would likewise find him in violation of 91.9. In fact, if Captain Fox

Captain Fox had mistakenly read back the clearance and simply touched the power levers before catching his mistake, the NTSB would still find that he had been "careless or reckless" in his operation of the aircraft. Clearly, that cannot be the intent of the regulation, and it is absurd to hold that non-negligent, non-careless, non-reckless operation of an aircraft can nevertheless be "careless and reckless". Such an interpretation makes no sense whatsoever. In fact, it is respectfully submitted that such an interpretation would render the regulation constitutionally defective as hopelessly vague and ambiguous in that there would be no possible means of determining exactly what conduct is proscribed. Penal statutes are construed narrowly to insure that no individual is charged with a violation unless "a fair warning [has first been] given to the world in language that the common world will understand of what the law intends to do if a certain line is passed" (*McBoyle v. United States* (1931) 283 U.S. 25, 27). The regulation in question gives the world fair warning that it prohibits careless and reckless conduct that results in actual endangerment to life or property. What is unfair is the action of the FAA and the NTSB in applying that regulation in situations where it has no applicability whatsoever.

CONCLUSION

As indicated in Petitioner's offer to proof to Judge Capps, nearly one-half of the incidents recorded during the study period were attributable to mis-dialing of a frequency. The mistake was caught and corrected and the flight proceeded uneventfully to its destination, *exactly as happened in this case.* No lives were endangered, *just as no lives were endangered in this case.* And yet, every one of those thousands of pilots was in violation of 91.9, as interpreted by the NTSB, and their flight privileges were placed in serious jeopardy. The regulation at issue does not proscribe non-negligent conduct, the regulation does not proscribe conduct that does not result in actual endangerment to life and property, and any interpretation that says it does is plainly and simply wrong. This Court should grant *certiorari* to make clear the scope of the regulation.

DATED: March 12, 1996

Respectfully Submitted,

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